No. 3906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AKTIESELSKAPET BONHEUR (a corporation),
Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY (a corporation), claimant, of the American Steamer "Beaver", her tackle, apparel, engines, boilers, furniture, etc.,
Appellee.

BRIEF FOR APPELLEE IN ANSWER TO APPELLANT'S REPLY BRIEF.

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Appellee.

No. 3906

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AKTIESELSKAPET BONHEUR (a corporation),
Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY (a corporation), claimant, of the American Steamer "Beaver", her tackle, apparel, engines, boilers, furniture, etc.,
Appellee.

BRIEF FOR APPELLEE IN ANSWER TO APPELLANT'S REPLY BRIEF.

We refer in this brief to appellant as libelant and to appellee as respondent, thus following for convenience the designations used in the preceding briefs.

It would seem hardly necessary to remark (in reference to the opening paragraphs of the brief under reply) that of course we have no thought but that the case should be decided on the evidence in the record and the law applicable to it. The phrase or two to which exception is taken were used quite incidentally as not unfairly descriptive, we think, of certain aspects of

the case. The owners of the "Bayard" whom the District Court said:

> "were in fact unwilling to accede to the regulations of the Shipping Board in regard to rates and seemingly desired to take their chances of getting higher rates later by leaving the ship idle during this period"

were surely at least "*to all intents and purposes* (and that was our phrase) defying" the government, and we certainly think that in asking our courts to give it the damages it claims here (based on the war-time market as it would have been but for the regulation of the Shipping Board) libelant is in effect asking that the courts give it the profit it would have reaped had it been able to make its defiance effective. Counsel himself puts libelant's position as "seeking the market rate for his vessel" meaning the rate as it would have been in the absence of governmental war-time regulation, the regulated rate being far lower. There were owners of sugar and flour like owners of ships, who preferred not to sell unless they could sell at unrestricted war prices (the "market" as counsel calls it) and the word that has come to describe that attitude is "profiteering". Of course libelant was entitled to pursue that course but, doing so, can hardly object to a description of the situation by the word that was made for it.

"Judicial notice" of these mounting war-time charter rates was sanctioned in *The Orion,* 239 Fed. 301, which is cited approvingly in libelant's own reply brief at page 25, so we cannot follow the exception

to our reference to it (Brief for Appellee, Appendix, p. V).

We now leave libelant's introductory paragraphs and come to the points in its reply argument.

I.

THE QUESTION OF BURDEN OF PROOF AND THE PROOF THAT IS IN FACT IN THE RECORD REGARDLESS OF BURDEN.

We do not see that so much importance attaches now to this question as libelant seems to think. The fact is that the case is in and whether it was libelant's burden to prove its claim or ours to negative it in first instance is not of large import now; for as we view the record and as the District Court found the claim *has* been negatived. The proofs went in, whether from us or libellant it is now, it would seem, practically immaterial, for they show and the evidence and the District Court's finding is that the Moore charter would not have been approved; that berthing for owners' account would not have been approved; that the only market was at the basic rate approved by the Shipping Board, and that the "Bayard" would have remained idle had the collision never occurred, rather than accept that market. On this state of the record libelant was properly denied any demurrage by the District Court whose decision is unaffected by any question of burden of proof.

We may say, however, that in so far as the question burden of proof of demurrage may still play any part

in the case as it stands we cannot concur in the point of view taken in libelant's reply brief.

It seems to be suggested that we were contending that libelant was required in first instance to negative all our objections to the demurrage or using libelant's words

> "to prove that the vessel would *not* have been prevented by the Shipping Board from sailing under the charter, thus throwing upon the libelant the onus of proving a negative. In fact requiring the libelant to negative the respondent's defense before respondent had established any defense". (Appellant's Reply Brief, p. 3.)

That is an astute but hardly a correct way of stating the position. The controversy in the case is not upon an affirmative defense pleaded by us. The issue on the damages claimed for demurrage is joined by libelant's pleading in Article VI of the libel that

> "the said owners will be further damaged by the detention of said vessel during the time required for her repairs in the loss of the use of said vessel" (Ap. p. 7)

and by our denial thereof in Article VI of the answer:

> "Claimant denies that the owners of said 'Bayard' will be or were further damaged by the detention of said vessel during the time required for her repairs in the loss of the use of said vessel." (Ap. p. 12.)

The burden of proof on facts thus alleged by a plaintiff or libelant and denied by a defendant or respondent is always, and from start to finish of the case, with the plaintiff or libelant, and was and is with libelant here on this issue of demurrage. And when the end of the

case comes the "risk of non-persuasion" to use the illuminating phrase employed by Wigmore as the equivalent of "burden of proof" (Evidence, Sec. 2485) is always with the plaintiff or libelant as the moving party. What shifts as the case progresses is not the burden of proof in the true sense but merely the duty of going forward with the evidence.

Thayer: Preliminary Treatise on Evidence, p. 355, ff.;

Wigmore on Evidence, Sec. 2485;

The Monongahela, 282 Fed. 17 (C. C. A. Ninth Circuit, June 1922).

The following passages from Chapter IX (The Burden of Proof) of Thayer's Treatise supra put the point vividly:

> "In legal discussion, this phrase, 'the burden of proof', is used in several ways. It marks, (1) The peculiar duty of him who has the risk of any given proposition on which parties are at issue,—who will lose the case if he does not make this proposition out, when all has been said and done. In saying 'the peculiar duty', I mean to discriminate this duty from another one, called by the same name, which this party shares with his adversary. (2) It stands for the duty last referred to, when discriminated from the other one; that is to say, the duty of going forward in argument or in producing evidence; whether at the beginning of a case or at any later moment throughout the trial or the discussion. (3) There is an undiscriminated use of the phrase, perhaps more common than either of the other two, in which it may mean either or both of the others." (p. 355.)

> "In general, he who seeks to move a court in his favor, whether as an original plaintiff whose

facts are merely denied, or as a defendant, who, in admitting his adversary's contention and setting up an affirmative defence, takes the role of *actor* (*reus excipiendo fit actor*), must satisfy the court of the truth and adequacy of the grounds of his claim, both in point of fact and law. But he, in every case, who is the true *reus* on defendant holds, of course, a very different place in the procedure. He simply awaits the action of his adversary, and it is enough if he repel him. He has no duty of satisfying the court; it may be doubtful, indeed extremely doubtful, whether he be not legally in the wrong and his adversary legally in the right; indeed he may probably be in the wrong, and yet he may gain and his adversary lose, simply because the inertia of the court has not been overcome; because the *actor* has not carried his case beyond an equilibrium of proof, or beyond all reasonable doubt. Whatever the standard be, it is always the *actor* and never the *reus* who has to bring his proof to the required height; for, truly speaking, it is only the *actor* that has the duty of proving at all. Whoever has that duty does not make out a *prima facie* case till he comes up to the requirement, as regards quantity of evidence or force of conviction, which applies to his contention; and, of course, he has not, at the end of the debate, accomplished his task unless he has held good his case, and held it at the legal height, as against all counter proof. This duty, in the nature of things, here as well as at Rome, cannot shift; it is always the duty of one party, and never of the other. But as the *actor*, if he would win, must begin by making out a case, and must end by keeping it good, so the *reus*, if he would not lose, must bestir himself when his adversary has once made out his case, and must repel it. And then, again, the *actor* may move and restore his case, and so on. This shifting of the duty of going forward with argument or evidence may go on through the trial. Of course, as has been said already, the thing that thus shifts

> and changes is not the peculiar duty of each party,—for that remains peculiar; i. e., the duty, on the one hand, of making out and holding good a case which will move the court, and on the other, the purely negative duty of preventing this. It is the common and interchangeable duty of going forward with argument or evidence, whenever your case requires it." (pp. 369-370.)

> "There is much ambiguity in what is said of the 'shifting' of the burden of proof. As to this it is vital to keep quite apart the considerations applicable to pleading, and those belonging to evidence. We see that the burden of going forward with evidence may shift often from side to side; while the duty of establishing his proposition is always with the *actor*, and never shifts. As we have only one phrase for two ideas belonging to two different subjects, we say, as it happens, that the burden of proof does, and does not shift." (p. 378.)

Libelant here essayed to make its proof by showing that Moore & Co., had offered to charter the "Bayard" but both Mr. Moore and libelant's agent, Mr. Kutter, testified that the charter would have to have the approval of the government before the "Bayard" could sail under it (Ap. pp. 19, 20, 121-123). Without that approval the mere offer of the charter made no case, even *prima facie*, for libelant (Appellee's Brief, pp. 58-60 and appendix thereto, pp. V-VIII). And the same would have been true of any attempted berthing for owner's account (Appellee's Brief, pp. 71-77).

Thus libelant never proved the market claimed by it even *prima facie*. Or if it did, that *prima facie* proof was overcome when we came to go forward with the

evidence which showed that that alleged market was *not* available and that the only market which *was* available was the 45 schilling per deadweight ton per month rate sanctioned by the Chartering Committee of the Shipping Board. That market, the evidence further showed, libelant would not have taken preferring to keep the "Bayard" idle in hope of higher rates later on. Libelant therefore never proved what it plead and we denied: that it suffered damages for detention of its vessel in consequence of this collision. That is the sum and substance of the decision appealed from. And the gist of it all at bottom is that libelant did not make out or sustain that fundamental never shifting burden of proof, as distinguished from the duty of going forward with the evidence which may move from one party to the other as the case progresses.

With the foregoing as background there would seem to be no great difficulty in dealing with the cases. We have contended that the burden of proof in this case rests on libelant, citing in the Brief for Appellee (pp. 10-11).

The Potomac, 15 Otto 630; 26 L. Ed. 1194;
The Conqueror, 166 U. S. 110; 41 L. Ed. 937;
The Clarence, 3 W. Rob. 283;
The Loch Trool, 150 Fed. 429;
The North Star, 140 Fed. 263; 151 Fed. 168.

To which we now add

The Watuppa, 283 Fed. 8,

decided by the Circuit Court of Appeals for the Second Circuit in June of this year and published in the

Federal Reporter Advance Sheets of November 23, 1922. On proof of demurrage the court says:

> *"In respect to damages based upon loss of earnings of the vessel while she was undergoing repairs, there must be clear proof that there would have been such earnings, if the collision had not occurred."*

If we correctly follow libelant's comment on these cases it does not question that libelant has the initial burden of proof, and the divergence between us would seem to be as to how far libelant must proceed before it comes to us to go forward with the evidence. For libelant, of course, does not question the authority of these cases which are in accord with the view expressed by Dr. Lushington in

The Clarence, 3 W. Rob. 283.

> "The question which I have to determine is not the rate at which such a vessel as The Clarence might be hired, but how much the company have actually lost by her detention whilst under repair. Upon this point the affidavit of Mr. Pratt is altogether defective, and he does not venture to swear that the company have sustained one single shilling of direct and actual loss. In order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss, and reasonable proof of the amount. Both must be proved, for the registrar and merchants cannot report a loss sustained without evidence. The second witness, Mr. Adams, who states himself to have been a manager of a steam company, and well acquainted with the earnings of steam-vessels, does not advance the case in the slightest degree. He leaves it exactly where it was left by Mr. Pratt, and does not prove

> any direct or actual loss at all. Under these circumstances I have no hesitation in saying that I must overrule the objection which has been taken, and confirm the report of the registrar. The objection, it appears to me, has been founded upon a misapprehension of the principle upon which the court proceeds in assessing the amount of damage. It does not follow, as a matter of necessity, that anything is due for the detention of a vessel whilst under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed. The *onus* of proving her loss rests with the plaintiff, and this *onus* has not been discharged upon the present occasion. Had the owners of The Clarence proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted; I therefore pronounce against the objection, and confirm the report with costs."

Libelant emphasizes, however, that the cases cited require that it should prove the *market* and the *amount* of the profits claimed and apparently conceives that that is the extent of the burden required of it. As we read the language of the cases it does not seem to us to be so limited, but granting for argument, without otherwise conceding, that it does, we hold that libelant in the case at bar never proved the *market*. The mere *offer* of the Moore charter without proof of its concededly indispensable adjunct—that it would have received the approval of the Shipping Board—was not proof of a *market* for the Bayard or of the *amount* of her alleged loss. The situation is the same if the claim be founded on *market* and *amount* on the basis

of berthing for owner's account. Approval of it would have been required and could not have been received (Appellee's Brief, pp. 71-77).

But if our view is erroneous and libelant is correct in the claim we understand it to make that, assuming the burden of proof, it made its *prima facie* case by proof merely of the *offer* of the Moore charter and that the duty of going forward with the evidence (inaptly called burden of proof) then shifted to us to show that the Moore charter would not have been approved —we hold that we made that showing. In other words, without going over again the evidence reviewed in our major brief, we think as there stated, that, apart altogether from any question of burden of proof, the record shows that the Moore charter would not have been approved, nor would berthing for owner's account.

That left libelant with its initial plea for demurrage —its general burden of proof in the true sense that the burden is always with the moving party—unsustained, unless libelant should again go forward with the evidence and overcome our showing—which it did not do.

On the contrary, in connection with our showing that the Moore charter and berthing for owner's account would not be approved, we proved that the only available market was that at the rate approved by the Shipping Board—45 shillings per deadweight ton per month. And we showed further that libelant would have been unwilling to accept that market and would and did, in preference, keep the "Bayard" idle as the Brazil was kept idle. Without reviewing again the

evidence or repeating the argument we refer to appellee's brief in chief (pp. 78-92).

As we have said, therefore, the question of burden of proof does not, with all the evidence in, seem to be of any very great significance. It will be noted by review of the headings in appellee's brief in chief that while we asserted that libelant had not sustained what we conceived to be its burden of proof we coupled the assertion with the further claim, in which we think the record bears us out, that, apart from burden of proof, the evidence showed that libelant was not entitled to any demurrage.

The comment of libelant on the cases we cited to the point that the loss claimed must be shown *with reasonable certainty,* thus also has now only at most an academic interest as apart from any burden the evidence shows that libelant sustained no damages. We think

The North Star, 151 Fed. 168,

and

The Winfield S. Cahill, 258 Fed. 318,

both cases from the Circuit Court of Appeals for the Second Circuit amply sustain our contention, the latter being particularly in point because it involved as does the case at bar, the question whether the government would have allowed the vessel to sail under the charter on which her demurrage claim as here was based (Appellee's Brief, pp. 16-17).

In *The North Star* the Commissioner rejected the testimony of libelant's agent that he would have ac-

cepted certain proffered charters but for the collision and held it inherently improbable that in view of the approaching close of the season of navigation the charters would have been accepted. Incidentally the Circuit Court of Appeals remarked respecting the conclusion of the Commissioner:

> "We think the commissioner was justified in rejecting this statement, and in reaching the conclusion that the two charters were not accepted because the libelant was unwilling to send out any of its vessels at so late a day as December 2d, and was therefore unwilling to contract. The functions of a commissioner, to whom it has been referred to take the evidence and report his opinion to the court respecting damages, are analogous to those of masters in chancery (Admiralty Rule 44), and his findings upon questions of fact depending upon conflicting testimony, or upon the credibility of witnesses, should not be disturbed by the court of revision, unless they are clearly erroneous."
>
> (151 Fed. p. 177.)

A fortiori, we should think, this court would be disinclined to disturb the district court's finding that the "Bayard" would have been idle in any event.

Ignoring *The Winfield S. Cahill,* supra, and commenting (and at that incorrectly as we shall presently show) only on *The Wm. M. Hoag,* 101 Fed. 846, libelant purports to dismiss our authorities on the reasonable certainty with which demurrage should be shown as "largely inferior court cases" (Appellant's Reply Brief, p. 9). The cases on which we laid chief stress in this connection were *The North Star* and the *Winfield S. Cahill* above mentioned and to these we might now add *The Watuppa,* 283 Fed. 8, all from the Circuit

Court of Appeals for the Second Circuit. We cited also briefly in the same connection *The Conqueror* from the United States Supreme Court (166 U. S. 110), *The Clarence* from Dr. Lushington (3 W. Rob. 283) and *The Tremont* from this Circuit Court of Appeals (161 Fed. 1). The district court cases cited were in accord with these higher courts.

The suggestion that "the cases relied upon by respondent are largely inferior court cases" (Appellant's Reply Brief, p. 9) is hardly borne out. Following the foregoing remark about "largely inferior court cases" libelant says:

> "The cases following are from courts of great authority, and if they conflict with respondent's cases they are for that reason preferable and more persuasive than those of respondent."

Libelant then proceeds to discuss one case from the Circuit Court of Appeals for the First Circuit, which is not in point; and three English cases which are only very indirectly in point, as they were primarily concerned with the very special questions of demurrage to public vessels.

The Circuit Court of Appeals case is

Randall v. Sprague, 74 Fed. 247.

It was not a case of collision at all but of demurrage under a charter party. Of course demurrage under a charter party whether by way of stipulated demurrage or damages for detention is not ordinarily suspended by the vessel's enforced idleness, just as her charter hire is not interrupted even by delays due to mutually excepted causes except where the charter party

specifically provides for cessation of hire as in the familiar breakdown clause.

American Asiatic Co. v. Robert Dollar Co. (Sept. 5, 1922, C. C. A. Ninth Circuit), 282 Fed. 743.

In *The Greta Holme,* VIII Aspinall's Maritime Cases, N. S. 317, the question involved was, as above suggested, whether a public vessel damaged in a collision was entitled not only to the cost of her physical repairs, but also to demurrage. Theretofore, apparently, demurrage had not been allowed to public vessels upon the theory that it could not be shown that their owners had sustained a tangible pecuniary loss. The craft involved in the collision was a dredger, operated by the Mersey Docks and Harbour Board. The House of Lords found that while of course this board was not earning profits with the dredge, nevertheless her loss of use was necessarily a cost to the rate payers who maintained her through the board and as the parties to the action wished the case not to be sent back to the registrar for the assessment of damages, the House of Lords fixed them. There is nothing in the case to suggest that demurrage would have been allowed if the dredger had been idle instead of being in active operation at the time of the collision.

Again, in *The Mediana,* IX Aspinall's Maritime Cases, N. S. 41, the vessel involved in the collision was one of a fleet of light-ships maintained by the Mersey Docks and Harbour Board. That board also kept a stand-by or substitute light-ship which was put in the place of the damaged vessel after the collision. The expense of maintaining the substitute light-ship was proved, and

the parties agreed upon the *amount* claimed in respect to hire of the services of this substitute light-ship as the measure of the loss of the use of the damaged light-ship—reserving the question whether such claim was recoverable. It was held that it was, thus settling in England it would seem, that demurrage is due where a regular stand-by ship is used, though a leading English authority says this is not so where a temporarily idle ship is used.

Roscoe on Damages in Marine Collisions, 2nd Ed., pp. 98, 99.

No such distinction is made in the American cases, where the general rule is applied that an owner using a substitute ship in place of a ship damaged in a collision, is entitled to demurrage.

The State of California, 54 Fed. 404.

The mention of the last named case leads us to digress to say that we cannot agree with libelant's statement on page 8 of its reply brief that *The Wm. M. Hoag,* 101 Fed. 846, is in direct conflict with the decision in *The State of California.* Admittedly the American rule allows damages, as we have said, for demurrage, even though a stand-by vessel is used as a substitute for a disabled vessel. In *The Hoag,* however, demurrage was denied because the damaged vessel—*"The Lurline"*—was injured while at a dock undergoing repairs and could not conceivably be held to have suffered a detention. The steamer "Undine" had taken the place of the "Lurline" upon the latter's route prior to the accident, and the only effect of the accident, so far

as the question of demurrage was concerned, was to continue the "Undine" where she was until the repairs on the "Lurline" were completed; it being the intention, upon the return of the "Lurline" to her route, to place the "Undine" upon the dock for repairs. This was not therefore a case of substitution of a standby vessel at all but of injury to a vessel which was idle at her dock and of the continuance on her run of another vessel which would herself otherwise have been idle at the dock for repairs. Libelant misapprehends the relation of *The State of California* to *The Wm. M. Hoag.*

From this digression we proceed to the last of libelant's English cases, namely, *The Astrakhan,* 11 Aspinall's Maritime Cases, N. S. 390. In that case the Probate, Admiralty and Divorce Division of the High Court of Justice held that where a Danish war vessel was injured in a collision it could not be said that she was not in the employment of her government, because it was not a time of war, as war vessels are used by governments for various other purposes. This, of course, is notorious.

None of the cases thus cited by libelant seem to us to be in conflict with our point that

> "the proof required is a showing to reasonable certainty that the vessel but for the collision would have been employed and would have earned the profits claimed" (Brief for Appellee, p. 11),

nor with our cases adverted to above which we think sustain that view. Certainly the vessels in all the English cases were shown to have been employed,

and as we have stated, libelant's one American case (*Randall v. Sprague,* 74 Fed. 247) is not a collision case at all, but a demurrage case, and not in point.

If it be libelant's suggestion that its initial burden of proof did not require it to show the employment, but that it was for us upon going forward with the evidence to show non-employment, we claim, as before stated, that that showing has been made in the case at bar (Brief for Appellee, pp. 78-92).

Libelant surely does not contend literally and apart from context for the italicized sentence from *The Mediana,* on page 12 of its reply brief, viz.:

> "For the wrongdoer has no right to inquire what or whether any use would have been made of the vessel of which the respondents were deprived."

If it does so contend it is asking this court to follow an English authority against the United States Supreme Court, for it was certainly held in *The Conqueror,* 166 U. S. 110, that a vessel which would have been idle in any event may not have demurrage.

> "Again, the court may properly take judicial notice of the fact that the yachting season in our northern waters practically comes to an end before the 1st of November, and, as the Conqueror was seized on August 27, during more than one-half the time for which demurrage was allowed she probably would have been laid up at her wharf. It is true there was a possibility that her owner might have desired her for use in a winter's cruise to tropical waters; but there was not the slightest evidence of that, and the contingency of her being so used was too remote to justify an allowance upon that basis."

Indeed it is a question how far these English authorities are of value in demurrage cases in our courts, in view of the Supreme Court's decision in *The Conqueror* that demurrage is not due for the detention of a private yacht which has not been used commercially; and certainly even with the interpretation placed upon *The Conqueror* in *The Vanadis,* 250 Fed. 1010 (Appellant's Reply Brief, p. 5 where the quotation from *The Vanadis* is mistakenly ascribed to *The North Star*) the demurrage damages claimed for a yacht must be proved with far more certainty than these English cases suggest. We think it open to question whether *The Vanadis* can be reconciled with *The Conqueror* at all, but certainly upon no other basis than that the damages were very definitely proved in *The Vanadis* by showing that $13,000.00 a month had been offered for the yacht for two preceding seasons; that such vessels were scarce and in demand at the time and that her charter value was $11,000.00.

II.

MR. SMULL'S TESTIMONY. THE EVIDENCE SHOWS THAT THE CHARTERING COMMITTEE WOULD NOT HAVE APPROVED THE MOORE CHARTER. THE TRANSVAAL.

Mr. Smull's testimony.

For answer to the second division of the Reply Brief for Appellant (p. 14), so far as it concerns the testimony of Mr. Smull, we need do little more than refer to pages 35 to 51 and 58 to 71 of Appellee's Brief in chief. We called attention at page 37 thereof to

the fact that counsel was considering Mr. Smull's testimony in part only, ignoring the positive testimony that if the Moore Charter worked out at more than the basic rate, as it did, it would not have been approved (Appellee's Brief, p. 41). The basic rate was the *sine qua non* of approval of charters except of neutral vessels in foreign ports, to which the board had to make concessions to get them into American ports and thus within the committee's jurisdiction. As counsel persists in dealing with an insolated fraction in Mr. Smull's testimony, apart from context, deliberately ignoring, even after the matter has been called to his attention, the testimony regarding the basic rate and the unalterable and invariable insistence upon it, his comments on that testimony both in his first and reply brief convey an utterly erroneous impression of Mr. Smull's evidence. Without further comment in this connection we ask only that the court read Mr. Smull's testimony and the pages of our major brief given above. We believe that upon such reading it will come to the conclusion so clearly reached by the District Court that the Moore charter would not have been approved.

Disapprovals.

Libelant says there were no disapprovals (Reply Brief, p. 15). It overlooks the disapprovals of the American Asiatic Company's offer for the "Bayard" of two hundred and seventy thousand dollars and of the offer of one hundred and seventy thousand dollars for the Arabien (Ap. pp. 196-197 and Appellee's Brief, pp. 60-71).

The Transvaal.

We need add nothing to the discussion of *The Transvaal* at pp. 52-58 of Appellee's Brief, except to say that that charter is immaterial, not merely because it does not fall within the period examined into on the New York depositions (Appellant's Reply Brief, p. 16) but because it is altogether outside the period examined into in the case at all. One might as well pick out a charter a year or two years after the detention period as three months afterward when for aught we know the circumstances were altogether different.

III.

THE DISPUTED ITEMS OF ALLEGED DAMAGE NOT INCLUDED IN THE STIPULATED PHYSICAL DAMAGES.

The argument made by libelant (Reply Brief, pp. 18-19) based on *The Conqueror,* 166 U. S. 110, is specious and unsound. *The Conqueror was* wrongfully *detained* and demurrage was denied her, not because she would have been idle in any event, but because she was a pleasure yacht and no pecuniary damages for loss of time could be or were proved. But the "Bayard" has been denied demurrage on the District Court's holding that she would have been idle in any event and that the expenses now claimed would have been incurred even if the collision had never happened. Ordinarily, as we all know, allowances are made in conjunction with damages for demurrage for wages and keep of such members of the crew as are reasonably

kept by the ship, and of watchmen, if and to the number that it be reasonable under the circumstances to employ them. See

The A. A. Raven, 231 Fed. 380,

where, as in *The Conqueror,* such allowances were made as were found reasonable and where demurrage would have gone hand in hand with those allowances except that the government which owned the vessel "is not claiming for loss of profits, or for losing the use of the dredge" (231 Fed. at p. 388).

In other words, expenses of the character under discussion, if reasonable, go hand in hand with demurrage as part of the *restitutio in integrum.*

It is only fortuitously, therefore, as in *The Raven* and *The Conqueror,* that expenses of the type under discussion are allowed *without* demurrage. Ordinarily they are awarded together. They stand or fall together.

The Tremont, 161 Fed. 1.

They would have gone hand in hand with demurrage in the *A. A. Raven,* supra had the government asked demurrage and in *The Conqueror,* supra had her owner been able to prove pecuniary loss for the detention which he undoubtedly sustained to a vessel that he would otherwise have been using at least during half the repair period.

The Conqueror is not authority for allowance of the claimed expenses here where the District Court found that the "Bayard" would have been idle anyway. To deny demurrage as it did on the last named ground and allow the expenditures mentioned would have in-

volved a fallacy which the District Court detected in disallowing the items.

Even if the other items were allowed it may be questioned whether those for the watchmen should be included in the absence of a showing that they were necessary when the crew of thirty men were standing by.

IV.

BERTHING FOR OWNER'S ACCOUNT.

It goes without saying that we have no disposition to misstate libelant's position. We might point out that the district court referring in its opinion to the proffered Moore charter said that:

> "It is on this offer that libelant bases its claim for the amount of damages sought as demurrage." (Ap. p. 304.)

And the language on page 47 of the Brief for Appellant which is identical with that used by libelant in its brief in the court below would seem to justify this conclusion on our part and on the part of the district court. That language, following the figures claimed for demurrage on the basis of the Moore charter, is: "For which amount we claim judgment with interest"; and the other computations were seemingly for illustration.

In any event the berthing for owner's account like the Moore charter would have been disapproved (Appellee's Brief, pp. 71-77).

Appellee's Reply Brief does not deal with Sections A and B of the Appendix to our major brief. The discussions of sections D and C of that Appendix are answered in an Appendix to this brief as these considerations are material only in the event of a reversal of the decree of the district court disallowing demurrage and form no part of the major argument.

We respectfully submit that the decree should be confirmed both in respect to the disallowance of demurrage and to the disputed items connected with physical damages and that we should have the costs of this appeal.

Dated, San Francisco,
December 9, 1922.

Respectfully submitted,

FARNHAM P. GRIFFITHS,
McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,
Proctors for Appellee.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

THE QUESTION OF OVERTIME OR DOUBLE SHIFTS.

The situation in respect to this matter was set forth in pages xx to xxiii of the Appendix to Appellee's Brief together with the authorities which required libelant to repair his ship with diligence. If appellant's ship was worth $4200.00 a day, overtime and double shifts should have been used.

Appellant urges in reply, first, that we are estopped from saying that double shifts or overtime should have been used, because of the agreement, between the parties. We quote the agreement entire, italicizing the parts which appellant omits in its quotation, for we deem them significant:

> "If the repairs to the 'Bayard' of the injuries resulting from her collision with the steamer 'Beaver' are repaired by the Union Iron Works Company on the basis of time and materials at going rates, the owners and underwriters of the 'Beaver', if that vessel is ultimately held liable for the collision, will not question the propriety of that method of repair. *This is entirely without prejudice to the question of liability for the collision.*
>
> To further eliminate as far as possible controversy over the character of repairs to be made, we suggest that it would be well to permit the surveyors for the owners and underwriters of the 'Beaver' to join with the surveyors for the owners and underwriters of the 'Bayard' in preparing specifications for the repairs. *This, also, is without prejudice to the question of liability for the collision.*" (Apostles, p. 323.)

Noting the italicized sentences, we beg to call to the court's attention that at the time of the agreement and at the time the repairs were made, liability for the collision was undetermined. Appellant was, under the settled rule, in duty bound to minimize the loss. This the appellant knew best how to do, and it was not for appellee to prescribe overtime when the bills, so far as known then, might have to be paid by the "Bayard's" owners.

The agreement was a convenience to the "Bayard's" owners to enable them to repair the vessel on the basis of time and materials at going rates at the Union Iron Works without the anxiety of having to prove that she could not have been repaired under contract, or that contract repair would not have been less expensive, or that the repairs could not have been made more reasonably at some other place. This was a courtesy to the appellant, which otherwise would have been annoyed with the usual difficulties of proving damages.

The phrase "going rates" does not denote straight time. It has no significance in respect to straight or overtime but refers to cost on either basis (Evers, Apostles pp. 281-282).

Appellant argues that we should have specified overtime if we wanted it. That was not our business. We had not then admitted liability. Certainly we could not object to overtime if it reduced the damages. Whether it would or would not we were not in the position to know.

Appellant cites the high rates then prevailing and quotes from the opinion in

The Orion, 239 Fed. 301,

that

> "all the world, even a judge, knows that freight rates have been steadily rising ever since the fall of 1914, and that every ship which could safely float has been in constant demand".

But the "Brazil", under the same managing ownership, was then or shortly after, idle in San Francisco harbor for two months. How could appellee know that the owners of the "Bayard" intended to use her? The high demurrage demand in the libel meant nothing. Certainly we could not be expected to anticipate that appellant was intending a serious claim for demurrage at far more than double the vessel's then market value (which was the approved Shipping Board 45-shilling rate), and at which reasonable value overtime might well not be justified. But the owners knew the situation. And if the "Bayard" was worth the vast figure they claim and they intended to use her, they should have employed overtime, for, as we have pointed out, liability for the collision was then undetermined. The simple significance of the nonuse of overtime is that the "Bayard" was going to be idle anyway and her owners knew it. They were not proposing to sail at Shipping Board rates.

The final answer to the contention that the agreement prescribed straight time is that, despite the agreement, overtime was in fact used for three days, on the dry-dock (Blackett, Apostles pp. 260, 269; Evers, Apostles

p. 276), and without our agreement or suggestion (Blackett, Apostles p. 269).

This also effectually disposes of the contention that if overtime was desired our surveyors should have suggested it. By reference to the agreement quoted it will be observed that the surveyors were authorized only

> "to join with the surveyors for the owners and underwriters of the 'Bayard' in preparing specifications for the repairs",

without prejudice. Thereafter they were at the yard only off and on to see that repairs were made within the specifications. Counsel's suggestion that they were directing or supervising the work is groundless. With liability still undetermined, how could they presume to propose overtime which the "Bayard's" owners might have to pay for?

Captain Bryn of the "Bayard" admitted that he kept Messrs. Blackett and Evers, representing the "Beaver's" underwriters,

> "fairly acquainted with the repairs as they were going on, and both of these men were down at the Union Iron Works, where they had their work at the same time in other ships as well, and they came down and looked at my ship *once in a while*". (Apostles p. 39.)

Mr. Blackett and Mr. Evers both testified that it was no part of their business to suggest the use of overtime (Blackett, Apostles p. 270; Evers, Apostles p. 278).

The contention that this is an underwriters' suit and that the underwriters object to paying overtime.

On the premise that underwriters normally object to paying overtime, as Mr. Blackett and Mr. Evers correctly stated, appellant argues that therefore the underwriters on the "Beaver" would have objected to paying overtime on the "Bayard". The argument is erroneous because it confuses that part of the marine insurance policy which insures the vessel concerned against loss or damage to her hull or machinery, with the collision clause, which insures her against liability to another vessel with which she collides.

The insurance against loss or damage to a vessel's own hull or machinery does not include demurrage. The insured vessel being injured, the underwriters pay the bill for physical damages, but the demurrage is for the owner's account. That is fundamental. Consequently, the general rule of the underwriters, as the surveyors testified in this case, is not to pay overtime. Reduction of demurrage is of no interest to the underwriters. While that is a general rule, if the owners can show that the overtime is a reasonable expense under the circumstances, the underwriters pay it under the average adjustment. Mr. Evers explained the situation very clearly at pages 278, 279 of the Apostles, but counsel for appellant seemed not to follow him because they were at cross purposes. Mr. Evers was explaining the underwriters' attitude toward the use of overtime in repairing the vessel that the underwriters directly insured; he was not referring to their attitude towards overtime in repairing a vessel in which the

underwriters become subsequently interested because of their insurance on the first vessel against collision liability. Counsel had in mind the second situation, whereas Mr. Evers was thinking of the first situation, and throughout the deposition counsel erroneously applied the statement that "underwriters do not pay overtime" to the situation of the vessel which the underwriters have not insured at all, and in which they become interested only by virtue of the collision liability insurance.

To put the matter concretely, the statement that the underwriters do not pay overtime would be normally applicable, so far as the "Bayard" was concerned, *to her own underwriters,* not to the underwriters on the "Beaver".

If the collision insurance (by virtue of the collision clause in the hull policy) like the major insurance in the hull policy against damage to hull or machinery, did not cover demurrage, then the "Beaver's" underwriters would not be interested at all in this contest, for demurrage alone is here at issue. But being obligated to meet a collision liability—the judgment if you will—it is senseless to say that the underwriters will not pay overtime. They will and must pay the judgment, and overtime is an immaterial consideration, except that, obligated as they are to meet *liability*, they are entitled to insist through the respondent that it insist that the damages be minimized—that overtime shall be used if the demurrage be high.

Appellant's argument is plainly fallacious. We urge, that two shifts should have been used if the "Bayard"

had the high value which her owners claim, or if two shifts were not possible, certainly overtime. A $4200 a day ship! Dilatory repair! How are they reconcilable?

The reference to a Commissioner.

We confess to some astonishment at the opposition expressed by appellant (Reply Brief, pp. 33-35) to a reference to the Commissioner for determination of the saving by overtime or double shifts or on account of owner's repairs should these considerations become material.

References to the Commissioner on matters of damages involving calculations, etc., are so common in the admiralty practice as to be accepted practically as a matter of course by the admiralty bar and the admiralty court.

Libelent itself made no attempt to prove its damages in the court below. The impression sought to be conveyed on page 34 of Appellant's Reply Brief that an agreement was entered into respecting the physical damages before the case was finally submitted and arrangements regarding filing of the briefs is incorrect. The court ordered a reference in the decree to determine the amount of the physical damages if the parties should not be able to agree upon it (Ap. p. 305). The reference was noticed but eventually the physical damages were stipulated (Ap, p. 308).

Our brief in the court below apprised libelant that we should desire to go into this matter of the deductions on the reference if they should become material.

Under the decision and decree of the District Court they were not material and the physical damages having been stipulated it would have been unjustifiable to take the time of the parties and of the Commissioner to go into them in mere anticipation that they might by some reversal or modification of the decree become material. If by any chance a mandate should come down from this court directing the lower court so to modify its decree as to make those considerations material, is the lower court to be estopped from ordering a reference to the Commissioner to assess the damages on the new basis as it previously ordered the reference to assess the damages on the basis of the original decree?

Incidentally we may remark that appellant's statements on pages 34 and 35 of the Reply Brief that we have suggested that by the use of overtime and double shifts there would be a total saving of $173,000.00, which is said to be ridiculous, is utterly without warrant as reference to Appendix D of our original brief shows clearly that we were asking a deduction for the saving that would have been made by overtime or double shifts in the alternative, not both of them.

DEDUCTION ON ACCOUNT OF OWNER'S REPAIRS.

Appellant denies the justice of this deduction, first of all, on the ground that no repairs were made for the owner except those directly necessitated by the collision, and that therefore there should be no apportionment of the period of repair.

The collision repairs and the so-called "engine" repairs were at opposite ends of the ship (Apostles, p. 265). The specifications for the collision repairs were drawn up and signed by all parties in the office of Mr. Frank, counsel for appellant (Apostles, p. 261). No items whatever on account of the overhauling or repair of the Bayard's engines were included in these specifications (Apostles, p. 261) nor in the judgment for the physical damages.

Appellant now claims that an overhauling of the engines was necessary on account of the collision and that the list of repairs set forth on page XIII of the Appendix to our brief in chief were all repairs made in connection with the overhauling of the engines. This is testimony in the brief by the appellant which does not appear in the record.

Mr. Siversen was appellant's witness. He testified:

> "Q. They overhauled the engines on the Bayard while she was there, didn't they? A. Yes.
> Q. *And* there was *some miscellaneous work* done for the owner's account, was there not?
> A. Yes * * *" (Apostles, p. 293).

> "A. * * *; in connection with the new foundations under the auxiliary motors there was a considerable amount of labor used; *it was outside of anything that was done on the engine.*
> Q. The auxiliary motors were entirely separate and apart, they had nothing to do with the main engines at all?
> A. No, nothing to do with the main engines.
> Q. That was a side job?
> A. That was aside from the main engines, yes. * * * (p. 296)
> Q. *Aside from the engines* was there any work done on the vessel for the owner's account?

A. *I spoke of the auxiliary engines.*

Q. *You said you put new foundations under those?*

A. *There was miscellaneous piping work and things of that nature;* I don't remember exactly.

Q. That is to say, work altogether apart from the work required on account of the collision; there is no question about that at all, is there?

A. Work that was charged to the owner's account'' (Apostles, p. 294).

Appellant's suggestion that the dirt in the engines was only the disorder and dirt generated in the engine and the engine room after the overhauling of the engines is answered by the testimony of the surveyor, Mr. Evers:

''Q. Was any work done upon the Bayard other than that necessitated by the collision, other than that required on account of the collision?

A. They did a lot of work on the engines, of course.

Q. What work did they do on the engines?

A. *They gave them an overhauling.*

Q. *Was that overhauling required by the collision?*

A. *We recommended nothing, because of the collision, on the engines.*

Q. Did you see what the contents of the engines was as they were overhauled?

A. I saw a lot of it come out.

Q. What was the condition?

A. Very dirty, indeed—*needed overhauling for dirt.*

Q. *Needed overhauling for dirt?*

A. *Yes, an accumulation of dirt''* (Apostles, pp. 276-177).

This answers appellant's argument that all the repairs for owner's account were made because the

engine might have gone out of alignment on account of the collision—pure surmise in any event.

The Authorities.

Appellant attempts to distinguish *The Sequoia,* 132 Fed. 625. This was the case in which the "Cleveland" was laid up for repairs on account of the collision with the "Sequoia". The owner made other repairs not necessitated by the collision but of substantial character and of benefit to the owner, and Judge de Haven held that the period of detention must be apportioned.

Appellant attempts to distinguish this case on the ground that the owner's repairs to the "Cleveland" had been commenced before the collision and says that the rule of this case is limited to cases where such facts appear.

Appellant seems not to have examined carefully the facts reported in this case. It will be observed on reading the report that three different classes of repairs were made, namely, repairs commenced prior to the collision, the collision repairs, and additional repairs for the owner's account which had *not* been begun before the collision. We quote from the report of the case:

> "It further appears that at the time of the collision certain necessary repairs to the boilers and machinery of the Cleveland were being made. These repairs were to have been completed *on May 31st*, but were not, because it was apparent that the steamer would necessarily be detained beyond that date on account of the damage caused by the collision. While this damage was being repaired, *the necessary repairs, which, but for the collision, would*

> *have been completed on May 31st, were proceeded with,* and, *in addition to these,* the owners of the Cleveland had *other repairs made during the same time,* which, while they may not have been then absolutely necessary to render her seaworthy, *were yet of a substantial character, and of benefit to the steamer. The making of these latter reapirs consumed about one week,* but did not interfere with or delay the repairs made necessary by reason of the collision."

The apportionment of the period of detention was made on account of the last class of repairs, as will be seen from the following:

> "It may be that these repairs *would not have been made at that time* except for the fact that the steamer was under detention because of the injury received by her in the collision with the Sequoia, but, nevertheless, the repairs made were substantial, and *must have been made some time in the near future. To allow the owners of the Cleveland to recover the entire value of her use during the time they were being made would really place them in a better position than if the collision had not occurred.* I am aware that this conclusion is opposed to the rule followed in the case of The Acanthus, 85 L. T. (N. S.) 696. I am not, however, satisfied with the reasoning upon which that decision is based. It seems to me more equitable to hold that upon the facts appearing here the libelants are only entitled to recover as damages one-half the value of the use of the Cleveland while she was undergoing repairs."

The case, therefore, is exactly in point with ours, namely, repairs of substantial benefit to the owner, not necessitated by the collision, were begun and made

after the collision, simultaneously with the collision repairs.

The Bratsberg, 127 Fed. 105, and

The John F. Gaynor, 124 Fed. 743, 130 Fed. 856,

cited in the Appendix to our major brief, page XV, are on the same principle as *The Sequoia.*

Appellant quotes passages from *The Marine Insurance Co. v. China Steamship Co.,* 6 Asp. 68; *Ruabon Steamship Co. v. London Assurance Co.,* 1900 A. C. 6, and *The Acanthus,* 9 Asp. 276, which show that the English rule requires that the owner's repairs not only be of substantial benefit to the owner but to be necessary. These requirements of the English rule were pointed out in our major brief, pages XV. to XIX. of the Appendix. We also pointed out, however, that Judge de Haven in The Sequoia, supra, expressly disapproved the rule of *The Acanthus* and held that the proper test was whether the repairs were substantial and of benefit to the vessel.

The rule for which we contended in our brief in chief is therefore sanctioned by the American authorities and is, we submit, correct on principle.